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Court of Appeals
Division II
State of Washington

No. 50075-2-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Tammy Rush,

Appellant.

Brief of Appellant

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1. Introduction

Tammy Rush was denied a fair trial because the trial court refused to admit testimony or evidence central to her defense theory of the case. Tammy Rush and her husband, Keith, ran a large methamphetamine sales operation in Portland, Oregon and Vancouver, Washington, from their home in Vancouver. Keith became an informant for Multnomah County and was instructed by law enforcement authorities to keep selling in order to set up other players up and down the supply chain for investigation and arrest.

When Clark County authorities arrested Keith and Tammy for possession with intent to deliver in January 2015, Detective Luque made the decision to let them go based on the informant relationship, ratifying that relationship and Keith's actions in furtherance of that relationship. Keith and Tammy relied on that ratification and continued to sell in order to fulfill the obligation to assist with additional arrests.

One year later, Clark County authorities arrested Tammy Rush for the January 2015 possession with intent to deliver, adding a charge for possession with intent to deliver in March 2016. Rush's defense was centered on the theory that she and Keith were acting in reliance on the informant relationship and Luque's subsequent ratification, which permitted them to

continue to possess and sell drugs in furtherance of the informant relationship.

At trial, the court refused to allow evidence of Keith's informant relationship, preventing Rush from presenting her theory of the case. Conviction for possession in this case violates due process where Tammy was affirmatively misled by Detective Luque's ratification of the informant relationship. This Court should reverse and dismiss the charges.

2. Assignments of Error

Assignments of Error

1. The trial court erred in refusing to admit the testimony of Keith Rush related to his informant relationship and Detective Luque's decision to release Keith and Tammy based on that relationship.

Issues Pertaining to Assignments of Error

1. A defendant may raise the defense of entrapment by estoppel if the defendant acted in reliance on a representation by a government agent that certain proscribed activity was in fact legal. *State v. Sweeney*, 125 Wn. App. 77, 83, 104 P.3d 46 (2005). Here, Tammy Rush acted in reliance on Detective Luque's ratification of Keith Rush's informant relationship. Did the trial court err in excluding testimony and evidence relevant to the defense? (assignment of error #1)

3. Statement of the Case

3.1 Tammy and Keith Rush sold drugs out of their Vancouver home, in reliance on instructions from law enforcement pursuant to a cooperation agreement to help arrest dealers up and down the supply chain.

Tammy Rush and her husband, Keith, ran a large methamphetamine sales operation in Portland, Oregon and Vancouver, Washington, from their home in Vancouver. *See, e.g.*, 2 RP 197, 204. They knew drug dealers up and down the supply chain and regularly bought and sold with them. 3 RP 338. Keith was arrested in Multnomah County, Oregon, and agreed to cooperate with authorities to help them arrest other dealers in exchange for leniency on the charges he faced. *Id.*

Keith had a meeting with the Multnomah County prosecutor and multiple county and federal law enforcement officers regarding the cooperation agreement. 3 RP 339. These officials handled drug enforcement in both Oregon and Washington. 3 RP 340. Keith's contact with the Multnomah County authorities was Officer J.D. McGuire. 3 RP 339. Keith was told that he should "keep doing what I was doing," which was running his operation in both states out of his Vancouver home. 3 RP 345-46; 3 RP 343. Keith's "marks" bought and sold in Washington as well as Oregon. 3 RP 339-40.

Keith testified about his continued operations, “you can’t raise suspicion when you’re doing these things. I can’t just step in and out with these big dealers and not -- them not raise suspicion and think something faulty about me. So J.D. [McGuire] was in the loop about all this, knew what was going on, and was trying to keep me safe and keep my name off paper.” 3 RP 343.

When Clark County authorities arrested Keith and Tammy for possession with intent to deliver in January 2015, Detective Luque made the decision to let them go based on Keith’s informant relationship. 3 RP 341-42; 6 RP 513-15. Luque understood that Rush’s activities were important to the success and safety of “multiple levels of investigation.” 6 RP 513-15.

While Keith was in Luque’s vehicle, Luque asked Keith if Keith knew an Officer J.D. McGuire. 3 RP 341. When Keith responded that he did know McGuire, Luque released Keith and Tammy. 3 RP 341. Luque testified that he didn’t say anything more about Keith’s informant relationship because he presumed that Keith could not talk about it with anyone but McGuire. 6 RP 523. McGuire later told Keith that he had spoken with Luque and that both Keith and Tammy should be clear from charges. 3 RP 347.

3.2 After the cooperation agreement concluded, Tammy Rush was arrested on year-old charges based on evidence obtained while Rushes were acting as informants.

One year later, in March 2016, Clark County authorities arrested Tammy Rush for the January 2015 possession with intent to deliver. 6 RP 496-97, 504 (state relied on probable cause from 2015 for the arrest). Rush was charged with one count of possession of methamphetamine with intent to deliver and one count of possession of cocaine arising from the January 2015 arrest and release. CP 6-7. She was also charged with one count of possession of methamphetamine with intent to deliver arising from new evidence discovered in March 2016. *Id.* A fourth count, for bail jumping, was added in September 2016. CP 60-61.

3.3 The trial court refused to admit testimony and evidence related to Rush's defense of entrapment by estoppel based on the representations made by officers related to the informant relationship.

Rush's defense was centered on the theory that she and Keith were acting in reliance on the representations and instructions given to them related to the informant relationship, and that Luque ratified those representations when he released them in January 2015. *See, e.g.*, 3 RP 222; CP 236. The trial court, after an offer of proof, refused to admit evidence of Keith's

informant relationship. 3 RP 357-60. The court would have allowed Keith to testify that Tammy had no knowledge of the drugs discovered in January 2015. 3 RP 360. However, Keith decided that if he could not testify about the informant relationship, he would exercise his Fifth Amendment right not to testify. 4 RP 376-77.

Tammy Rush was found guilty on all counts. CP 212-17. She was sentenced to a total of 74 months confinement based on counts 1 and 2 running consecutively. 5 RP 498-99.

4. Argument

4.1 The trial court erred in excluding testimony and evidence related to Tammy Rush's defense of entrapment by estoppel.

Ordinarily, a criminal defendant is entitled to present their theory of the case to the jury through testimony of witnesses and other evidence. Here, the trial court prevented Tammy Rush from presenting her theory of the case by excluding the testimony of her key witness, Keith Rush. As shown above, Keith Rush would have testified that the drugs that formed the basis of the January 2015 counts were related to his efforts under a cooperation agreement under the direction of Officer McGuire. He would have testified that he relied on representations from McGuire that both he and Tammy would not be prosecuted for their activities in furtherance of the

agreement. Officer Luque, acting for Clark County, ratified McGuire's representations when he released Keith and Tammy after discovering the drugs at their residence in January 2015.

"If the defendant relied upon an express representation by a government agent that certain proscribed activity was in fact legal, the defendant may raise the **defense of entrapment by estoppel** against any charge based on that proscribed activity."

State v. Sweeney, 125 Wn. App. 77, 83, 104 P.3d 46 (2005)

(emphasis added). The defense is a **due process** defense

"grounded in traditional notions of fairness inherent in our system of criminal justice." *State v. Leavitt*, 107 Wn. App. 361, 371, 27 P.3d 622 (2001).

"The due process argument is, in essence, that the criminal statute under which the defendant is being prosecuted cannot constitutionally be applied to the defendant without violating due process of law, where government officials have misled the defendant into believing that his conduct was not prohibited." *Leavitt*, 107 Wn. App. at 371-72. The defendant must prove 1) that a responsible government official induced him to rely on the official's representation of what was legal; and 2) that the defendant's reliance was reasonable, meaning that a person sincerely desirous of obeying the law would have accepted the information as true. *State v. Krzeszowski*, 106 Wn. App. 638, 646, 24 P.3d 485 (2001). "The ultimate due process

inquiry is whether a defendant's conviction, **for reasonably and in good faith doing that which he was told he could do**, is fundamentally unfair in light of the content of the information he received and its source." *Leavitt*, 107 Wn. App. at 368 (emphasis added).

Because due process is a Constitutional question, this Court's review should be de novo. *State v. McCuiston*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012).

The trial court excluded Keith Rush's testimony on the grounds that the representation that Keith and Tammy could continue their drug enterprise in Vancouver came from a government official in Oregon, not Washington. 3 RP 358-59. The trial court appears to have reasoned that the defense failed as a matter of law because there was no evidence that a Washington official did anything to induce reliance. If the defense failed as a matter of law, Keith Rush's testimony would be irrelevant and therefore inadmissible.

However, the trial court overlooked the fact that, by releasing both Keith and Tammy after discovering two pounds of methamphetamine at their residence in January 2015, Officer Luque **ratified** the representations made by McGuire that Keith and Tammy would be clear of charges if they continued to deal in furtherance of the cooperation agreement. Luque himself testified that he was aware of the Oregon investigations, that he

knew Keith was working as an informant, and that he released Keith and Tammy on that basis. By letting them go free, Luque ratified McGuire's representations as a responsible government official in Washington.

It is fundamentally unfair that the State came back over one year later and charged Tammy Rush with the crimes (counts 1 and 3) that the State had originally represented to her, through Luque's ratification, would not be charged due to the cooperation agreement. At the very least, Tammy Rush should have been entitled to present her evidence and argue her defense to the jury, with appropriate instructions.¹

5. Conclusion

Because Tammy's convictions on counts 1 and 3 violated her rights to due process, this Court should reverse the convictions, dismiss the charges, and remand for resentencing based on only counts 2 and 4. Alternatively, this Court should

¹ "A defendant in a criminal case is entitled to have the trial court instruct upon [her] theory of the case if there is evidence to support the theory. In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury. A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting [her] theory of the case." *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P.3d 287 (2009).

reverse and remand for a new trial, with instructions to admit evidence relevant to the entrapment by estoppel defense.

Respectfully submitted this 26th day of October, 2017.

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Certificate of Service

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